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No. [redacted] 36 October Term, 1936

In the

Supreme Court of the United States

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania

Petitioner

vs.

ISRAEL BINENSTOCK, Individually, and as surviving partner of the partnership firm of SWINGER AND BINENSTOCK, and BESSIE SWINGER, Individually, and as executrix of the Estate of Benjamin Swinger, deceased.

Respondents

Brief for Respondents in Opposition to the Petition for Writ of Certiorari

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

1. INTRODUCTION

The statements contained in the petition under the headings "Summary Statement of Matters Involved," "Opinions of the Courts Below," "Jurisdiction" and "Statutes Involved" are correct.

The petition, however, makes a fundamental error in stating the Respondents' premise and a further error of argument.

The Respondents do not contend that Congress, if it chooses, may not provide by statute when set-off shall be allowed in liquidating a national bank. The Respondents' position is that Congress has not done so. The pertinent statute* provides only that there shall be a "ratable dividend." Who may be a creditor and to what extent is not covered at all. To extend in the statute the provisions necessary for such a determination would require a

*Section 5236 U. S. R. S. (U. S. C. Title 12 Sec. 194); petition p. 6.

statement of all known civil law with daily amendments. The determination of who are creditors and to what extent depends on the law of the locality or upon general law according as local or general matters are involved. Many facts may be conceived which would establish a creditor position in one state and not in another. There can no more be unformity upon this subject than upon many others. There might be uniformity upon the single subject of set-off if all the states' legislatures so required. They have not done so and there are differences of result in different states.

Congress might have required uniformity upon the question of set-off in the liquidation of national banks but it has not done so. Consequently, there may be lack of uniformity but that lack has not yet appeared. All the cases on the subject in the liquidation of national banks arrive at the same result upon the point involved in this case. The only case cited in the petition as being in point is *In re Schults*, 132 Fed. 573 (D. C. N. Y.) petition, page 13. The facts in that case are not given in the petition. It appears that the bank in that case was a private bank in bankruptcy in New York and not a national bank in liquidation. The court relied on the New York rule.

At page 14 the petition cites a case from Indiana and urges the adoption of the Indiana rule as the correct one. There is no reason why it should not

be the rule in Indiana. But an Indiana case goes no further to establish a uniform federal rule than do the Pennsylvania cases which reach an opposite result.

As will be shown below the decisions of the federal courts are in accord with the decision of both courts below in this case. But if this were not so, it might well be questioned whether there should be a general uniform rule to establish the right of set-off in national bank liquidations. Banks are not created to be liquidated and there is no reason why the convenience of the Comptroller of Currency should for no other reason than his convenience prevail over other considerations. The operation of national banks necessarily should be uniform because the right to operate is derived from a single source. But the property rights and contractual considerations which determine who shall be a creditor and to what extent originate in local law. If local law is not recognized, two banks, side by side will liquidate in different ways. Local uniformity rather than national uniformity is desirable in such a case.

Realizing that local law is the primary origin of creditor rights against a national bank Congress has not attempted to replace that law with a whole body of law applicable only to national banks. Even the provision for a "ratable dividend" is not peculiar to the liquidation of national banks.

Respondents agree with the petition (P. 10) "The National Banking Act is not affected by state statutes or decisions in conflict therewith." There is however no provision in the act to resolve the question in hand. The only recent federal decision is in accord with the decision in this case. Whatever "Federal rule" there is has been followed. As a matter of fact there are not enough cases to make much of a "Federal rule." So the court below accepted the Respondents' invitation to observe that the Pennsylvania cases are in accord, thus producing at least local uniformity.

A brief discussion of the cases follows:

2. UNDER THE FEDERAL CASES THE SET-OFF SHOULD BE ALLOWED

The bill of complaint is filed to take advantage of the rule recognized in the federal courts as well as in the Pennsylvania courts that equitable set-off will be allowed under the circumstances recited because, the bank being insolvent, it would deprive

the plaintiffs of a remedy they had before the failure, not to allow the set-off.

The theory is that while the obligation of the partnership firm to the bank is a joint obligation, liability therefor is both joint and several. In other words, if the bank sues the partnership firm it may secure a joint judgment, but at that point the lack of mutuality, if any exists, ceases. The partners are individually liable each for the entire amount of the partnership indebtedness in execution upon the judgment against the firm. Therefore, as a matter of equitable fact, the individual partners are liable severally to the bank on the partnership obligation. Under these circumstances, it would be inequitable to allow the bank to enforce its claims and not allow the set-off.

1 Williston on Contracts, Sec. 316

> "The idea (of a joint obligation) ceases to be practical when a judgment has been rendered against joint contractors and the plaintiff wishes to satisfy that judgment."

Therefore, if the bank brought an action against the partnership firm on these notes, it could claim in execution the assets of the individual partners. Suppose then the individual partners should bring suit against the bank for their individual deposits and secure judgments. The case would then be one of complete and perfect mutuality. The indi-

vidual partners could then come into equity and demand an offset of the claims. The only reason this procedure cannot take place at law is by reason of the insolvency of the bank making it impossible for the individual depositors to bring suit to recover their deposits. It is inequitable that the bank should be permitted to secure rights which it would not otherwise possess by reason of its own insolvency and consequent default.

The cases generally allow an equitable set-off at the outset under these circumstances where one of the debtors is either insolvent or a non-resident.

The precise case has arisen in the First Circuit and the equitable set-off has been allowed. This is the only case in the federal courts directly in point.

Roelker v. Bromley-Shepard Co., Inc. et al
73 Fed. 2d, 618 (1934) C.C.A. 1

Certiorari denied, 294 U. S. 713

In this case a corporation and an individual were obligated to a national bank on a joint note. When the bank closed both the corporation and the individual had deposits at the bank in excess of the note. A bill in equity was brought to compel the offset. First, a motion to dismiss was filed and overruled. The case went to trial on an agreed statement of facts, and a final decree was entered allowing the offset. This decree was appealed by

the receiver of the bank to the Circuit Court of Appeals for the First Circuit and the decision was affirmed.

All of the arguments here advanced by the petitioner were advanced in that case. Reference was first made to the provisions of the National Banking Act (12 U. S. C. A. Sec. 21 *et seq.*) which require a ratable distribution of the bank's assets among its creditors. It was contended that this precluded the possibility of set-off. This argument, many years ago, was rejected by this Court in a case which will be referred to below. In the Bromley-Shepard case the Circuit Court of Appeals for the First Circuit states, at page 619:

> "We do not think Congress intended by the National Bank Act to deprive depositors of the right of equitable set-off when justice requires it. The language of the court in Scott v. Armstrong, *supra,* in discussing this statute, is applicable to the situation here:"

Upon the merits, the same court stated:

> "(2) Conceding that at law, and generally in equity, a claim of one of two joint obligors cannot be set off against the joint debt, it is well established that, where justice requires, and there is no adequate remedy at law, a court of equity under such circumstances will

order a set-off, and a bill in equity to compel such set-off is a proper form of remedy."

* * *

"(4) Under the circumstances of this case, we think that justice requires that so much of the deposit of the Bromley-Shepard Company, Inc., in the insolvent bank as was necessary to pay the joint note, should be set off against the corporate note of the Bromley-Shepard Company, Inc., though the note was also signed by the treasurer of the corporation as a comaker."

This Court denied a petition for certiorari (294 U. S. 713). The only change in the authorities since then is the decision of the case at bar in accord.

Scott v. Armstrong, 146 U. S. 499 (1892)

In this case a national bank became insolvent and its assets were taken over by a receiver. Upon the date of the insolvency it held a note against a depositor who had a deposit at the bank. Because the note was not due at the date of insolvency, it was contended that the set-off should not be allowed and that in any event set-off was not allowable under the provision of the National Banking Act providing for a ratable distribution of the assets of a closed bank. Chief Justice FULLER, in

an opinion allowing the set-off, dealt with this argument at page 510:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

and at page 511:

> "We are dealing in this case with an equitable set-off, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank."

The question of allowing a joint claim to be set off against the separate claims of the joint debtors had been previously dealt with by way of dictum by this Court.

Gray v. Rollo, 18 Wallace, 629 (1873)

In the case cited above the facts were as follows: The insolvent claimant was a fire insurance company. It held notes on which Moses Gray and one Gaylord were jointly liable. It owed money upon a fire loss, not to Moses Gray individually, but to a partnership consisting of Moses Gray and his brother Franklin Gray. Moses Gray attempted by a bill in equity to compel the insurance company to set off the amount due on the policies to Gray Brothers against the joint obligation of himself and Gaylord. He alleged in his bill that his brother Franklin assented to and authorized the appropriation of half of the amount due on the policies to the extinguishment of his liability upon his joint note to Gaylord, but this Court apparently considered that this allegation was unimportant. This Court distinguished from the facts before it a number of other cases, among them, *Tucker v. Oxley,* 5 Cranch, 34. At page 634, in the opinion in Gray v. Rollo, Justice BRADLEY says:

> "But the case of Tucker v. Oxley will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt,

but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker."

It is clear that under the federal decisions the set-off should be allowed.

3. UNDER THE PENNSYLVANIA DECISIONS THE SET-OFF WOULD BE ALLOWED

The court below states (R. 12):

"The law of the State of Pennsylvania if applicable would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart v. Coulter,* 12 S. & R.

252; *Cochran v. Cutter,* 18 Pa. Sup. Ct. 282. See also *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477."

Childerston, et al v. Hammon, 9 S. & R. 68 (1822)

In this case an action was brought, upon a single bill, against two defenders jointly. The defendants proved that the plaintiff did not own the action but that it was owned by a third party, named John Hammon, and that the action was being brought for his benefit. The defendants further proved that John Hammon was indebted to one of the defendants in a sum greater than the amount due upon the single bill. The trial court rejected this evidence. This decision was reversed and a new venire ordered upon the theory that if these facts were true the set off should be allowed.

Stewart v. Coulter, 12 S. & R. 252 (1825)

In this case an action was brought upon a claim by Stewart against two joint defendants, Coulter and Day. The trial court allowed as an offset a claim by Coulter alone against Stewart. The action was brought in the Supreme Court sitting at *nisi prius.* Upon motion for a new trial the trial judge stated, at page 253:

"At the trial, my opinion was, that the indebtedness of the plaintiff to one defendant

was, of itself, unless there was some superior equity in a third person, a subject of set-off by that defendant, although he had been sued with others, and might be set off on the trial under our act of assembly, which has been always considered as more comprehensive than the British statutes of 2 Geo. II, Ch. 22, and 8 Geo. II, Ch. 24. That opinion has not been changed, and is unchangeable; for if the very able arguments of the counsel of the plaintiffs could not change it, it cannot be shaken."

Justice GIBSON filed a separate opinion in which he states as follows:

"For myself, I cannot admit that this set-off could be claimed at law, or that there is in this respect any material difference between our act of assembly and the Stat. 2 Geo. II, Ch. 22. But whatever difference does exist, is against the set-off, our act having regard to cases where a balance may be recovered by the defendant, and it cannot be said that partners may recover a debt separately due to one of them. But I throw this out only as my own opinion, and as we all agree that the debt due by Stewart to Coulter was a proper subject for equitable defalcation, I shall rest the opinion of the court on that ground alone."

Cochran v. Cutter, 18 Pa. Super. Ct. 282 (1901)

In this case the surviving partner of a firm composed of two persons engaged the plaintiff, one of their customers who was indebted to them, to work for a new firm formed to carry on the business after the death of his co-partner. The persons constituting the new firm were the surviving partner, the widow and the sole heir of the deceased partner. The question was whether they could set off the plaintiff's debt to the old firm against his claim against the new firm. At page 284 Judge RICE says:

> "Accordingly it has been held repeatedly in Pennsylvania although the rule seems to be different in some of the other states of the Union, that two or more defendants jointly sued may set off a debt owing by the plaintiff to one of them:"

The foregoing three cases were cited by the Supreme Court of Pennsylvania in the case of *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477 (1918) at page 482. They were distinguished but in no manner criticized and it may, therefore, be taken that they still represented the views of the Supreme Court of Pennsylvania. There are no later cases.

4. THE FEDERAL COURTS WILL GIVE WEIGHT TO STATE COURT DECISIONS IN DECIDING A QUESTION OF GENERAL LAW

The 34th Section of the Judicature Act of 1789 provides:

> "That the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

In the early case of

Swift v. Tyson, 41 U. S. 1 (1842)

this Court announced the doctrine that this section of the Judicature Act applies only to the statutes of the States as construed by their courts and to purely local matters, such as the title to real estate and that the so-called common law or decision law of the States on matters of general law is not binding upon the federal courts.

This case has been the subject of an enormous amount of controversy and it is now generally

recognized that the decision was probably wrong. It has never been overruled, is still sometimes cited, and very frequently distinguished.

There is an article of some 83 pages in length in

37 Harvard Law Review, 49

This article refers to the original documents to which Justice STORY, who wrote the opinion in Swift v. Tyson, did not have access, and shows that if he had known the facts back of the drafting of Section 34 his decision would have been otherwise. The article states, at page 52:

> "Had Judge STORY seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was."

and at page 85:

> "It now appears from an examination of the Senate Files, however, that if Judge STORY and the Court had had recourse to those Files in preparing the decision in Swift v. Tyson, it is highly probable that the decision would have been different, and that the word 'laws' in Section 34 would have been construed to include the common law of a State as well as the statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which

the amendment containing Section 34 was written, and which is, with little doubt, in Ellsworth's handwriting."

Professor Beale, in his new book

The Conflict of Laws, Vol. 1, page 25, section 3.5 (1935)

says, concerning the decision in Swift v. Tyson, at page 26:

"This decision, unfortunate in that it unsettled the minds of lawyers as to the law and thus made it difficult to advise clients, was nevertheless quite within the right of the court; the federal court in the state was given by the Constitution of the United States as full power to declare the law as the state court. The law thus declared was of course the law of the state, but the way in which it was decided, the weight given by the court to the decisions of courts, and especially of federal courts, in other states, led lawyers to apply the name of 'federal common law' to the doctrine.

This phrase 'the Federal Common Law' leads to a natural assumption that there is a law of the United States parallel to the law of the states and administered by the United States courts. This common law is supposed to be a law of the United States on almost

every point which is administered by the federal courts. This led to a curious controversy both of courts and of periodicals as to the possibility of such a law. After the controversy had subsided legal thought went on as usual and the Supreme Court of the United States decided that there was no such thing as a law of the nation apart from the laws of the states."

Since Swift v. Tyson has not been definitely overruled, it is impossible to find decisions in lower courts which directly criticize it. They merely avoid it in many cases. The real criticism is to be found in some of the dissenting opinions to decisions of this Court. One of these is found in the case of

Black & White Taxicab and Transfer Company v. Brown & Yellow Taxicab and Transfer Company 276 U. S. 518 (1928)

In this case a Taxicab Company had a contract with the Railroad Company giving the Taxicab Company the exclusive rights to serve a particular station. The question was whether this contract was enforceable. Under the law of the State of Kentucky, where the station was, the contract would have been held invalid. This Court held that the question of the validity of the contract

was a matter of general law and disregarded the state decisions. Justice HOLMES filed a dissenting opinion in which Justices BRANDEIS and STONE joined.

The fallacy back of Swift v. Tyson was discussed in the following language, at page 533:

> "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is. The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law.
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> * * *
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> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that

there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

and at page 534:

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. * * * I see no reason why it should have less effect when it speaks by its other voice. * * * If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain."

and at page 535:

> "Mr. Justice STORY in *Swift v. Tyson,* 16 Peters, 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that Sec. 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice STORY probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review, 49, at pp. 81-88.
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> * * *
>
> "I should leave Swift v. Tyson undisturbed, as I indicated in Kuhn v. Fairmount Coal Co., but I would not allow it to spread the assumed dominion into new fields."

The suggestion of Justice HOLMES of limiting Swift v. Tyson has been adopted by many cases, and the rule has grown up that while the federal courts are not bound by state decisions upon matters of general law they will give weight to them in order to avoid conflict as far as possible.

This rule is stated in

25 Corpus Juris, Page 846, Section 185

as follows:

> "If a question depends upon principles of general jurisprudence, or rests upon general or commercial law, the federal courts will decide for themselves and are not bound by state decisions. But although such courts are not absolutely controlled by state decisions, yet they will give weight thereto if they are called upon to construe the general commercial law of a state upon a new question, and they will also act upon principles of comity, to avoid conflict as far as possible, without sacrificing their own dignity, and in case of doubt may for the sake of harmony lean toward the views of the state court."

A great many cases are cited for the latter proposition. It is impractical to brief all the cases upon the subject. The following are in point and themselves cite many other cases to the same effect:

Sim v. Edenborn, 242 U. S. 131 (1916)

In this case a question of general commercial law came up for decision. The Circuit Court of Appeals for the Second Circuit declined to follow

the decisions of the New York state courts. In reversing this position, Mr. Justice McReynolds discusses the effect to be given to the decision of the state courts, at page 135:

> "This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman,* 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' This has been often reaffirmed."

Nine decisions by this Court are cited immediately following this quotation.

Trainor Co. v. Aetna Casualty & Surety Co. 290 U. S. 47 (1933)

In this case the holder of a mortgage took a bond to assure the completion of a building upon the mortgaged premises. The building was not erected and the question was the measure of damages against the bonding company. The courts of

Pennsylvania have stated that under such circumstances the measure of damages is the cost of the building, notwithstanding the mortgage was adequately secured without the building. The trial court refused to follow this rule and allowed nominal damages only. The decision was affirmed by the Circuit Court of Appeals for the Third Circuit. This Court reversed the decision and held that the decisions of the Supreme Court of Pennsylvania should be followed. In limiting the rule of Swift v. Tyson, Mr. Justice SUTHERLAND states as follows at pages 54-55:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt.' *Burgess v. Seligman*, 107 U. S. 20, 33-34. And see *Sim v. Edenborn*,

242 U. S. 131, 135, where the authorities are collected; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right.''

As shown by the footnote to the citation from Corpus Juris a very great many cases could be cited to the same effect.

Turning to the case at bar we find the rule in Pennsylvania settled by decisions of long standing. The federal rule, it is contended by appellant should be different. The federal cases are in accordance with the decisions of the courts of Pennsylvania.

It is submitted, therefore, that whether or not Swift v. Tyson is still in effect the decision below was correct and the petition should be dismissed.

5. SOME OF THE CASES CITED IN THE PETITION ARE NOT IN POINT

As already pointed out in the introduction the case of *In re Schults,* 132 Fed. 572 (D. C. N. Y.) is cited on page 13 of the petition followed by the bracket: "(involving precisely the same question here under consideration)." The bank in the Schults case was a private bank and was being liquidated in bankruptcy within the state of New York. The decision relies on New York decisions. The liquidation of a national bank was not involved.

On page 10 the petitioner cites the case of *First National Bank of San Jose v. California,* 262 U. S. 366. In this case the state of California filed a proceeding against a national bank requiring that a deposit inactive upon the books of the bank for more than twenty years be escheated to the state of California under a state statute providing for such procedure. The state courts sustained the action and on a writ of error to the judgment of the Supreme Court of California, the decision was reversed on the ground that the state legislature could not pass an act abrogating the deposit con-

tract in a national bank. The case stands simply for the point that a state legislature cannot provide for the escheat of a deposit in a national bank. This is a question of operation, not of liquidation.

Again on page 10 the petition cites *First National Bank v. Selden,* 120 Fed. 212 (C. C. A. 7).

In this case Selden was the receiver of a closed national bank which had on deposit a sum of money with the First National Bank of Chicago. Before closing the insolvent bank had drawn checks against this deposit fund sufficient to exhaust it. Under the law of Illinois, the drawing of checks against the fund is an assignment pro tanto of the deposit. Under the federal cases, this is not so. The receiver of the closed bank brought an action to recover the deposit whereupon the First National Bank of Chicago filed a bill in equity to enjoin the suit. The bill was dismissed on the ground that in the case of this irreconcilable conflict between the federal and state decisions, the federal authorities would prevail. In the case at bar this conflict is not present.

On page 11 the petitioner cites *McCandless v. Dyar,* 34 Fed. 2d, 989 (1928) D. C. S. D., South Dakota. In this case a national bank issued certificates of deposit which were guaranteed by the defendant and five others. After the bank suspended the defendant was obliged to pay out on his guaranty and took up the certificates. At the

time of the endorsement the defendant was indebted to the bank. The receiver of the bank brought an action on this indebtedness and the defendant sought to offset the amount he had paid under his endorsement. The offset was denied on the theory that, while the endorsement of guaranty was made prior to the closing of the bank, there was no debt owing from the bank to the defendant until afterwards when the defendant was obliged to pay on account of his endorsement. Therefore, the set-off was not allowed. The case did not involve the point under consideration in the case at bar.

The authorities cited in the petition do not support its contention and it is submitted that the petition should be dismissed.

Respectfully submitted,

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